MICHAEL RODAK, JR., CLERK

Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, Secretary of the Interior,

Respondents.

AMOCO PRODUCTION COMPANY, and MARATHON OIL COMPANY,

Petitioners.

v.

JICARILLA APACHE TRIBE, et al., and CECIL ANDRUS, Secretary of the Interior,

Respondents.

On Petition(s) For A Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

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BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, AND TRIBAL CONSTITUTIONAL PROVISIONS INVOLVED

Respondents submit that there are no substantial questions involving the Interstate and Indian Commerce Clause, Article I, §8, Clause 3 of the Unitied States Constitution, and that the Leasing Act of March 3, 1927, 25 U.S.C. §§398a-e, is not applicable to the leases at issue as stated by Petitioners Amoco Production Company and Marathon Oil Company. Respondents further submit that the Treaty of Guadalupe Hidalgo is irrelevant to the issues of this case. Additional provisions of Article XI of the revised Constitution of the Jicarilla Apache Tribe are relevant and the entire Article is reproduced in Respondent's Appendix E.

STATEMENT OF THE CASE

Respondent Jicarilla Apache Tribe concurs in the Statements of the Case in both Petitions, except as to the relevancy of the Treaty of Guadalupe Hidalgo to the issues of the case, the application of the Act of March 3, 1927, 25 USC §§398a-e, and the finding of the Court that 80% of the oil and gas extracted from the reservation is shipped or sold outside the State of New Mexico.

INTRODUCTION TO RESPONSE

The Tribe will respond to both Petitions in this Brief. The Petition of Merrion and Bayless, et al., No. 80-11, will be referred to by Respondent as the "M&B Petition". The Petition of Amoco Production Company, et al., No. 80-15, will be referred to as the "Amoco Petition". The Tribe will refer to the Appendix filed by Petitioners in No. 80-11

as the "M&B Appendix", and the Appendix filed by Petitioners in No. 80-15, as the "Amoco Appendix". The Appendix of this Respondent will be designated as "Respondent's Appendix".

I

THIS CASE DOES NOT PRESENT QUESTIONS OF FEDERAL INDIAN LAW WHICH HAVE NOT BEEN RESOLVED

This case presents neither legal issues of first impression nor questions of "far ranging social, political, and economic consequences for both Indian and non-Indian" as stated by Petitioners. The power to tax non-Indians is vital to the very existence of Indian governments. But the effect on non-Indians of taxation by tribes of non-Indian enterprises and activities is magnified by Petitioners far beyond its national importance. Indian power to tax non-Indian enterprises on Indian reservations, unless withdrawn by Congress, has never been successfully disputed. Petitioners' arguments questioning this particular tax are based on erroneous interpretations of the Indian Mineral Leasing Acts and distortions of the language of the Jicarilla Apache severance tax ordinance. Moreover, the possible social, political and economic consequences fancied by Petitioners are grossly exaggerated as explained below in this Response.

The question of power of Indian tribes to tax non-Indian lessees extracting oil and gas from Indian reservation lands is one which has been resolved by this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (U.S., decided June 10, 1980) [hereinafter cited as *Colville*]. The attempts in both Petitions to distinquish *Colville* from this case must fail in light of the repeated decisions of the courts and the opinions of Attorneys General of the United States acknowledging

tribal power to tax non-Indian activities taking place on property situated on Indian trust lands, particularly where the Tribe has a significant interest in the subject matter. This was one of the tribal powers under "existing law" confirmed by Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476. *Colville, supra,* slip op. at 16. The Tribal Council of the Jicarilla Apache Tribe was granted power by its IRA Constitution to "enact ordinances, subject to approval by the Secretary of Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation." Amoco Appendix M. The Jicarilla Apache Tribe obviously has a more significant interest in the subject matter of production of non-renewable resources such as oil and gas, than do the Colville tribes in cigarette sales. See *White Mountain Apache Tribe v. Bracker*, No. 78-1177 (U.S., decided June 27, 1980).

The claim of the Amoco Petitioners that the case presents a fundamental conflict between tribal power to tax and the Congressional grant to the states of power to tax production of oil and gas from Indian reservation lands, is based upon the false assumption that the leases in suit were issued pursuant to the General Leasing Act of March 3, 1927, 25 U.S.C. §§398a-e, which authorizes state taxation of such production. The District Court was permitted by Petitioners to proceed under the misapprehension that the leases in suit were issued under the 1927 Act, although in fact, these leases were issued pursuant to the Act of May 11, 1938, 25 U.S.C. §§396a-g. It appears that all oil and gas leases by tribes organized under the Indian Reorganization Act which have been issued since the effective date of the Act of May 8, 1938, have been issued under the terms of the later Act, which does not grant power to the states to levy taxes on production on Indian reservations

and whose terms are inconsistent with the 1927 Act.[1] There is thus no "fundamental conflict" as stated in the Amoco Petition. The jurisdiction of the State of New Mexico to impose severance taxes on production on the Jicarilla Apache Reservation is not at issue in this suit and must be determined separately on the basis of a balancing of interests of the Tribe, the Federal Government and the State as set forth in *Colville, supra*, slip op. at 19-22.

Petitioners engage in extensive operations, including geophysical and seismic exploration, drilling of wells, laying of pipelines and cutting of roadways which disturb the surface of the reservation lands and have a significant impact upon the environment, economy, culture and daily lives of tribal members. The State of New Mexico neither regulates this activity nor provides the additional services required to mitigate the impact of these operations. The United States Geological Survey divides the responsibility with the Bureau of Indian Affairs in performing environmental assessments, supervising drilling, production operations and other activities.[2] Because of failure of the Department of Interior to enforce lease provisions, including diligent development of leases, and prompt and correct royalty payments, the Tribe was obliged to secure compliance through its own initiative. The Tribe's actions are described in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F.Supp. 536, (D.N.M. 1979); *See* note 6 *infra*,

[1] The history of the various leasing acts is treated below under Point II.

[2] Section 4 of the 1938 Leasing Act, 25 U.S.C. §396d, provides that oil and gas leases issued on restricted Indian land shall be subject to rules and regulations promulgated by the Secretary of Interior. Amoco Appendix J at 3j. Pursuant to the Act the Secretary has adopted comprehensive regulations for supervision of oil and gas leasing and operations on Indian lands, compiled in 25 CFR Part 171 (Bureau of Indian Affairs) and 30 CFR Part 221 (Geological Survey).

p. 7. Also, the Tribe has taken its gas royalties in kind and actively protected its interests and rights under royalty gas gathering and exchange agreements negotiated with pipeline purchasers. *See Jicarilla Apache Tribe v. Federal Energy Regulatory Commission*, 578 F.2d 289 (10th Cir. 1978). The State of New Mexico has had no role in these matters. The Tribe further provides numerous services on the reservation supported from tribal revenues which benefit employees of the Petitioners as well as Indians, and which support Petitioners' operations. Testimony of Richard TeCube, *reprinted* Respondent's Appendix A.

The exaggeration by Amoco of the burden on the energy consuming public and the states of the tribal taxes exemplifies the efforts of the energy companies to exploit the resources of the Indian tribes with no concern for protection of the environment of "Indian Country", or for the social welfare of communities disrupted by energy development. Oil production on Indian lands in 1979 was only 0.77% of total U.S. production (23,873,120 barrels out of a total U.S. production of 3,107,610,000 barrels), and gas production on Indian lands was only 0.6% of total U.S. production (118,351,000 Mcf out of total U.S. production of 19,671,000,000 Mcf).[3]

If *all* of the 1979 oil and gas production on Indian lands in the United States were taxed by Indians at the Jicarilla Apache tribal tax rate, the total tax on all such Indian oil and gas production in the United States would be approximately $14,000,000, less than 2/10ths of 1% of the $7.4 billion of first quarter earnings, 1980, of 19 "Petroleum Products" companies. Wall Street Journal, April 30, 1980, at 22.

[3] *Federal and Indian Lands, Oil and Gas Production, Royalty Income and Related Statistics*, U.S. Department of Interior, Geological Survey, June 1980. Indian Production at 73; Total U.S. Production at 383.

Petitioners have suggested throughout these proceedings that tribal governments should be supported by taxation of tribal members alone. It is not credible that Congress intended tribes to support their governments by self-taxation leaving the giant corporations depleting their resources tax free, particularly in view of the congressional policy expressed in the Indian Reorganization Act, and the historical poverty of Indians and the meager resources of tribal governments. According to the 1970 census, the mean income of 149,122 Indian families in the United States in that year was $6,857; Indian per capita income was $1,573. 38.3% of all Indian individuals had income below the poverty level. The total income of all Indians in the United States was just over one billion dollars in that year.[4] The 1970 net earnings of five of the Petitioners - Atlantic Richfield, Conoco, Inc., Gulf Oil Corporation, Mobil Corporation, and Phillips Petroleum, totalled over 1.5 billion, greatly in excess of the total income of all the Indians in the United States in that year.[5]

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[4] Figures derived from the 1970 Census of Population, U.S. Department of Commerce Report, American Indians, Table 9.

[5] Total net earnings after taxes of the five companies mentioned quadrupled during the period 1970 to 1979, as reported by Standard & Poor's N.Y.S.E. Stock Report (Vol. 47, 1980):

	1970	1979	Page Reference
Atlantic Richfield	$ 206 million	$1,166 million	244
Mobil	$ 483 million	$2,007 million	1529
Gulf	$ 550 million	$1,322 million	1078
Conoco	$ 160 million	$ 815 million	606-U
Phillips	$ 117 million	$ 891 million	1826
Totals	$1,516 million	$6,201 million	

Official information is not yet available as to 1979 or 1980 per capita income of Indians in the United States, but it is doubtful if Indian per capita income has kept pace with that of the general population, much less with the earnings of the energy companies. In any event it seems clear that taxes such as those at issue in this case are vital to the survival of Indian governments, but have insignificant impact on the producing companies such as Petitioners.

Since enactment of the Indian Self-Determination Act, 25 U.S.C. §450, the tribes have taken an increasingly important role in the protection of their rights under mineral leases and protection of the environment of their reservations from irresponsible and unnecessary degradation. The Department of Interior has been neglectful in assisting the tribes in this effort. *Jicarilla Apache Tribe v. Supron Energy Corp.*, *supra*, at 540, 553[6].

Petitioners' statement that the Jicarilla tax imposes a significant burden on prices of oil and natural gas (Amoco Petition at 8) is not supported by the record. Obviously, all taxes have some effect on development and extraction of oil and gas and other minerals. But the effect of the Jicarilla tax on oil and gas prices is negligible. The Tribe made a detailed and comprehensive study of the impact of

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[6] The Court in *Jicarilla Apache Tribe v. Supron Energy Corporation*, described the Tribe's demands, beginning in 1973, that the Secretary take appropriate action to make determinations required of him under the terms of the oil and gas leases involved, and to require lessees to perform their obligations as required by the leases. The Court stated at 547:

> I find that, notwithstanding the unique and extensive effort given by the USGS to monitoring the Tribe's leases and defendants-lessees' adherence to the terms therein (footnote deleted), the Secretary has breached his fiduciary duty to insure for the Tribe that its lessees have complied with the term of the leases which requires diligent development.

The Court found that the Secretary had failed to monitor development of the leases adequately to ensure compliance with the terms of the leases and entered a declaratory judgment to that effect.

The Court further stated at 553:

> Plaintiff, like many Indian Tribes in recent times, has demonstrated its desire and ability to carry on business relations of its own, devoid of the paternalistic shroud in which it must be enveloped by the Secretary by virtue of the Tribe's legal status as a ward of the United States. It is Congress, however, and not the Court who is empowered to liberate the Indian Tribes from the protection imposed on them by the United States Government.

the tax on the consumer, which was considered by the Tribal Council of the Tribe prior to the enactment of the tax. The study established that the tribal tax would increase the cost of gas to New Mexico consumers by 6/10 of one cent per Mcf; the cost to interstate customers in California by 1/10 of one cent per Mcf; and that the impact on oil consumers would be insignificant.[7] *Reprinted* Respondent's Appendix B. Petitioners made no such study. There was no evidence to support the finding of the District Court that if producers were required to absorb the tax, it would substantially limit their ability to operate profitably some existing wells (Amoco Appendix C at 6c).[8]

The Jicarilla Apache severance tax will provide vitally needed revenues that will enable the Tribe to provide governmental services beneficial both to tribal members and to Petitioners at a minimal cost to the consumer. In any event the burden of non-discriminatory taxes on local transactions is a matter for the appropriate legislative body to consider, not the courts. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973).

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[7] Report of Dr. Alfred L. Parker. *The Economic Impact of a Proposed Oil and Natural Gas Severance Tax*, July 1976. Respondent's Appendix B.

Contrast the impact of the tax imposed by the Windfall Profit Tax Act of 1979, Pub.L. 96-223, 94 Stat. 229, which is also "an excise or severance tax on domestic oil producers and royalty owners" (Senate Report No. 96-394 at 2), the tax is expected to produce revenues of up to $15 billion a year from 1980 to 1990. *Id.* Table 1, at 10.

[8] The Court's finding was based entirely on the testimony of Thomas Dugan, which was directed to the burden of the tax on oil production. On cross-examination, Mr. Dugan testified as to only one "marginal" well which was a gas, not an oil well. Record, vol. IV, at 63—64. As to gas wells, he admitted he could pass on to consumers all of the tax. *Id.* at 55. There was no evidence whatsoever that the tax would tend to make any lease unproductive in paying quantities and subject to default.

The Commerce Clause issues raised by Petitioners are also spurious.[9] This case does not involve questions of either Indian or interstate commerce since the tax is levied on the privilege of severing oil and gas on the Tribe's reservation, a local event. Petitioners' strained construction of the tax ordinance was rejected by the Court of Appeals. Amoco Appendix A at 16a-20a. This will be addressed in Point IV below.

Petitioners equate tribal resources to publicly owned property and conclude from this erroneous premise that the development philosophy of a tribe is subject to scrutiny or even frustration by the states and the producers. Amoco Petition at 10. Congress has not delegated to the states and certainly not to the producers any authority with respect to "development philosophies" of the tribes. The Indian Reorganization Act made it clear that tribes were free either to develop resources or prevent their development:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe, and to negotiate with the Federal, State, and local Governments. 25 U.S.C. §476, *reprinted* Amoco Appendix I.

The Constitution of the Tribe, approved by the Secretary of Interior, authorizes development of tribal lands and natural resources for industrial or other purposes, provided that such development is based upon sustained yield principles where applicable, and provided that such development is designed for the general welfare of the

[9] Amoco Petition, Point IV; M&B Petition, Point 4.

Tribe as a whole. Tribal Constitution, Article XI, §1(a)3, *reprinted* Amoco Appendix M.

In a brief filed in the District Court, the Merrion and Bayless Petitioners included the following quotation (Record, vol. I, at 46):

> Indians do not require oil to carry on their traditional economic and social activities. There is nothing about Indian culture which contributes to the value of oil or which should instill in Indians an appreciation for the substance, apart from the revenue it provides. Oil conservation is the vital concern of the white public, not the Indian, and the accident of the oil's location beneath public lands set apart for Indians does not reduce the need for its conservation in the interests of white culture.

Forgetting the above argument that oil conservation is the "vital concern of the white public", Petitioners now complain that the tribes might use their taxing power and restrict the development of their natural resources. M&B Petition at 6; Amoco Petition at 9-10. Since Congress has specifically authorized the tribes to adopt their own "development philosophies" and the Jicarilla Apache Tribe in its Constitution has authorized development based on the constraints mentioned, there is no justiciable issue as to "development philosophy" that merits the attention of this Court.

Congress has consistently acted to support tribal efforts to achieve self-determination and economic self-sufficiency and has acknowledged the continuing authority to levy taxes as a necessary adjunct to self-determination. Congressional expressions of current policy can be found in the Indian Self-Determination Act, 25 U.S.C. §450 and the Indian Financing Act of 1974, 25 U.S.C. §1451. The

power to levy severance taxes was expressly recognized in Section 110 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3320, *reprinted* Respondent's Appendix C.

II

THE COURT OF APPEALS OPINION DOES NOT CONFLICT WITH THE PRINCIPLES OF COLVILLE; 25 U.S.C. §398c IS NOT APPLICABLE TO THE LEASES IN SUIT

Petitioners in both cases attempt to differentiate the severance tax at issue in this case from the *Colville* tax by asserting that tribal power to tax oil and gas production has been divested by federal law, that is, 25 U.S.C. §398c, and by the asserted overriding interest of the federal government encouraging uncontrolled development of mineral resources on Indian lands.[10]

Petitioners' argument that Congress pre-empted tribal taxation by authorizing state taxation of oil and gas production on Indian reservations under the 1927 Leasing Act 25 U.S.C. §398a, is refuted by the express recognition in Section 110 of the Natural Gas Policy Act of 1978 of Indian severance taxes. Respondent's Appendix C. State severance taxes are defined in Subsection (c) of Section 110 to include taxes imposed on the production of natural gas by any State or Indian tribe. It is thus clear that power to impose tribal severance taxes has not been divested by Congress, nor has Congress considered that any overriding national interest would be frustrated by this taxation.

Congress has not pre-empted the power to tax oil and gas by the Tribe in favor of the State of New Mexico. The authorization granted to the states to tax production on Indian lands contained in the 1927 Act, 25 U.S.C. §§398a-e,

[10] Amoco Petition, Points II and III; M&B Petition, Point 2.

was eliminated in the 1938 Leasing Act, 25 U.S.C. §§396a-g.

It became apparent to the Interior Department after the implementation of the Indian Reorganization Act of 1934 that various Indian leasing acts were in a patchwork state. F. Cohen, *Federal Indian Law*, 328 (U.N.M. ed.). Sections 2 and 3 of the 1927 Act, 25 U.S.C. §§398b and c, provided that proceeds from rentals, royalties or bonuses of such leases should be deposited in the Treasury of the United States to the credit of the particular tribe and should be available for appropriation by Congress for expenses connected with the supervision of the industry and for the benefit of the Indians, and authorized the Secretary to pay taxes out of "*the*" Tribal funds in the Treasury. This Act was inconsistent with the objectives of the Indian Reorganization Act which provided for management of tribal property and funds by incorporated Tribes. *Id.* at §§476, 477.

Acknowledging the confusion in the various Indian leasing acts, the Acting Secretary of Interior, Charles West, on June 17, 1937, transmitted to the House and Senate, a proposed comprehensive bill to govern the leasing of Indian lands for oil and gas and other minerals. *See* House Report No. 1872, 75th Congress, Third Session 1937. The Acting Secretary stated on page 3 of the Report:

> The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

Section 1 of the 1938 Act, 25 U.S.C. §396a, *reprinted* Amoco Appendix J, provided for leasing of tribal lands for oil, gas or mining purposes "by authority of the tribal council or other authorized spokesmen for such Indians". Section 2 of the Act, 396b, provided for sale at public auc-

tion under regulations prescribed by the Secretary and included a further important addition as follows:

> *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476, and 477 of this title, to lease lands for mining purposes *as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to Section 461, 462, 463, 464-475, 476-478, and 479 of this title.* (emphasis added).

Section 7 of the 1938 Act provided:

> All Act[s] or parts of Acts inconsistent herewith are hereby repealed.

It is important to note that the emphasis of the 1938 Act was to provide for issuance of oil and gas leases by the tribes, specifically subject to provisions of tribal constitutions; that there was no requirement that the monies be paid into the treasury of the United States; and that there was no authorization for taxation by the states of production from lands leased under that Act.

The leases in this case were issued pursuant to the Act of May 11, 1938, 25 U.S.C. §§396a-g. The lease attached to the Amoco Complaint (*excerpts reprinted* Respondent's Appendix D), provided in the "Forest and Land Protection Stipulations", which were an integral part of all leases, as follows:

> The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Apache Reservation, the lessee hereby agrees: . . .

The District Court refused to require Petitioners to place their leases in evidence to prove the execution of the leases or the authority for the leases. Record, vol. VI, at

251. The only proof as to statutory authority for the leases was the certificate of Harold TeCube, the Jicarilla Agency Realty Officer, Bureau of Indian Affairs, filed with the Tribe's Motion for Leave to Amend Answer (10th Cir. Joint Appendix A at 117-21), which stated that the leases were issued under the 1938 Act.

The current federal regulations governing leasing of tribal lands for mining (including oil and gas), 25 C.F.R. Part 171, refer only to the 1938 Act and the Indian Reorganization Act as statutory authority for the regulations. The 1927 Act is not cited.[11]

Paragraph 3c of the Standard Lease Form dated November, 1947, attached to the Amoco Complaint (*reprinted* Respondent's Appendix D) provides that all rental and royalty payments, except as provided in Section 4(c) (royalty in kind) "shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day check or draft is issued, to the order of the Treasurer of the Tribe or the Superintendent." A footnote to Section 4(c) specifies that payment is made to the Superintendent only where the Tribe concerned is not organized under the Indian Reorganization Act. The Constitution of the Jicarilla Apache Tribe provides that the Tribal Council is responsible for management of all funds within the control of the Tribe and may appropriate available tribal money for public business and governmental purposes. Respondent's Appendix E, Constitution Article XI, §1(c),

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[11] The headnote following the Table of Contents of 25 C.F.R. Part 171 states:

AUTHORITY: Secs. 16, 17, 48 Stat. 987, 988, sec. 9, 49 Stat. 1968, sec. 4, 52 Stat. 348; 25 U.S.C. 396d, 476, 477, 509. Interpret or apply secs. 1, 2, 49 Stat. 1250; 48 U.S.C. 358a, 362, unless otherwise noted.

SOURCE: 22 FR 10588, Dec. 24, 1957, unless otherwise noted.

Tribal Funds. Thus, since rentals and royalties are paid directly to the Tribe and not deposited in the United States Treasury, there is no money with which to pay state taxes imposed pursuant to the provisions of 25 U.S.C. §398c. This is clear from the proviso of that section that "such taxes shall not become a lien or charge of any kind against the land or other property of such Indians."

The lack of reference to taxation in the 1938 Act, together with the failure of Congress to continue the requirement that Indian royalties be paid into the Treasury, the failure to provide another manner of collection of taxes, and the express repeal of all inconsistent statutes, is clearly indicative of Congressional intent to eliminate the taxation provision of the 1927 Act with respect to leases let under the 1938 Act.

> . . . [T]he failure to set out former statutory provisions in a later comprehensive enactment will operate to repeal the omitted provisions which are inconsistent, and also former provisions which are repugnant to the later legislation. 1A *A. Sutherland, Statutes and Statutory Construction*, §23.13 (4th ed., 1972).

III

TRIBAL POWER TO TAX IS NOT LIMITED TO THE POWER TO EXCLUDE NON-MEMBERS FROM THE RESERVATION

Petitioners argue that the power to tax recognized in *Colville* appears to be based solely on the power to exclude non-members from the reservation or attach conditions to their entry. *Colville, supra* at 16. Amoco Petition, Point III; M&B Petition, Point 1.

This interpretation of the Court's decision in *Colville* is incorrect. The power of an Indian tribe to levy taxes is

an inherent attribute of tribal sovereignty and unless withdrawn by treaty or by an Act of Congress is "a proposition which has never been successfully disputed". F. Cohen, *Federal Indian Law*, *supra*, at 41.

The Constitution of the Tribe approved by the Secretary of Interior expressly provides for taxation of non-Indians doing business on the reservation. Article XI, §1(e), *reprinted* Amoco Appendix M. As stated previously in this Brief, Congress has not acted to deprive Indian tribes of the power to levy taxes of this kind on non-Indians using tribal lands or exercising privileges upon them. To the contrary, Congress has specifically recognized tribal severance taxes on natural gas in the Natural Gas Policy Act of 1978. *See p. 11 supra.* It is pointed out in *Colville* that courts have consistently upheld tribal power to tax. The cases cited in *Colville* need not be cited again here; however, the Court in *Morris v. Hitchcock*, 194 U.S. 384, 389 (1904) noted that "[t]he law in question seems to have a twofold object, — to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and to raise revenue." The first object was to impose the license or fee paid to the Tribe pursuant to the Tribe's power to exclude. The second object was to help support the tribal government pursuant to the Tribe's inherent power to tax. The Court upheld both as proper. The Court also noted with approval a similar tax imposed by the Cherokee Nation:

> And in the last-mentioned opinion it was, in substance, declared that, under §16 of the Curtis act, the Secretary of the Interior had authority to collect a tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation, and that the tax was just as applicable to hay raised upon lands occupied by individual members of the nation, as

> their share of the public domain, pending allotments, as in any other case, and would be so even if the shipper was the absolute owner of the land on which the hay was raised. *Id.* at 392.

The Chickasaw tax, approved June 3, 1902, was retroactively applied to stock within Chickasaw territory "since January 1, 1902," thus it was not based on the power to exclude non-Indians. *Id.* at 385 n. 1. The Cherokee tax referred to, imposed on removal of natural products severed from Indian lands by non-Indians, was strikingly similar to the severance tax now in issue.

The dual nature of most Indian taxes was again recognized and upheld by the District Court in *Confederated Tribes of Colville v. State of Washington*, 446 F.Supp. 1339 (E.D.Wash. 1978). The Court noted two objectives of the Tribe's tax as "the regulation of conditions under which cigarettes could be sold to Indians and non-Indians on the reservation, and to generate revenue for essential tribal governmental programs." *Id.* at 1361.

There is no conflict in recent decisions of the Courts of Appeals on the issue of tribal power to tax non-Indian activities on reservations, nor is there any likelihood of change of opinion when pending cases are decided.

Five of the cases mentioned by the Merrion and Bayless Petitioners on page 8, footnote 7, as a part of the "new flood of litigation" respecting Indian taxes, are pending in District Courts in the Tenth Circuit. The *Salt River Project* case mentioned in footnote 6 on that page and *Kerr-McGee Corporation v. Navajo Tribe* in the District of Arizona mentioned in paragraph 7 are in the Ninth Circuit. The Ninth Circuit Court of Appeals in *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (1976), *cert. denied*, 430

U.S. 983 (1977), found no problem with taxation both by the County of San Bernardino and the Tribe, strongly indicating that that Court would uphold tribal sovereign power to tax activities or property of non-Indians on trust lands.

The Eighth Circuit Court of Appeals is also in accord. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (1956), cited with approval in *Colville*, a "tax" was specifically upheld. The Court very clearly set forth the facts of the case and stated that the "plaintiff has leased some of his land within the Pine Ridge Reservation for grazing purposes to *non-members* of the Oglala Sioux Tribe" (emphasis in original) and that the Tribe had "*assessed a tax against plaintiff's lessee* for the privilege of grazing stock on land within the reservation . . ." (emphasis added). *Iron Crow*, *supra*, at 90. As in the present case, the non-Indian lessee was already on the reservation pursuant to an authorized lease. Thus, the power to exclude could not have been the basis for the Court's approval of the tax because the Tribe could not exclude or remove the holder of a valid lease. The Court held that the Oglala Sioux Tribe still retains its inherent sovereignty except where it has been taken away either by treaty or Congressional action. *Id.* at 94. The Court added that the Tribe properly provided for "the levy of taxes" in its constitution "in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. §476." *Id.* at 99. Finally, the Court stated:

> We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists. *Ibid.*

The Court upheld the Sioux tax, making no distinction between a tax and a license.

The language in *Colville* is not susceptible to the narrow interpretation sought by Petitioners. This Court stated:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. *Colville, supra*, slip op. at 15.

Tribal interest in raising revenues for essential governmental programs "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services" *Id.* at 20. The Jicarilla Apache Tribe is vigorously protecting its gas and oil resources (*Jicarilla Apache Tribe v. Supron Energy Corp.*, note 6, p. 7 *supra*) and provides substantial services to Petitioners. *See* p. 5 *supra*.

The Amoco Petitioners argue that the severance tax unilaterally increases the royalties payable by lessees. The power to tax cannot be limited by implied exemptions or limitations. The power of the State of New Mexico to increase its severance taxes from time to time on production from state lands, leased to taxpayers with rental and royalty rates fixed by the lease terms has never been questioned. The cases cited by Petitioners, *Puerto Rico v. Russell & Co.*, 315 U.S. 610 (1942), and *Murray v. Charleston*, 96 U.S. (6 Otto.) 432 (1877) are not in point. They hold that a special tax or assessment may not be levied for the purpose of relieving a government of its indebtedness (*Murray, supra*) nor can special assessments be imposed

for maintenance and operation where earlier contracts had exempted the Respondents from contributing to such costs. (*Puerto Rico, supra*) This Court in *Wells v. Savannah*, 181 U.S. 531 (1901), and again in *Puerto Rico*, made clear that general taxes laid for the support of government could only be avoided by clear proof of a valid contract of exemption from such payments. The Jicarilla Apache Tribe has never exempted Petitioners or waived its power to tax either expressly or impliedly.

IV

THERE ARE NO SUBSTANTIAL QUESTIONS RAISED AS TO INTERFERENCE WITH INTERSTATE OR INDIAN COMMERCE

A. The Tribal Tax Does Not Discriminate Against Interstate Or Indian Commerce.

The Jicarilla Apache severance tax is an excise or privilege tax on the business of producing oil and gas on the Tribe's reservation measured by the volume of production at the wellhead. By the language of the Tribal tax ordinance it is "imposed on any oil and natural gas severed, saved and removed from tribal lands", that is, extracted from tribal soil. It is levied on all crude oil, condensate and natural gas "produced" on the reservation. Ordinance, paras. 2 and 3, *reprinted* Amoco Appendix N at 1n. The tax is paid by the operator of each well. Each operator is required to file a return showing the "total volume of oil, gas and condensate, and BTU of gas produced from each well each calendar month . . ." *Id.* para. 6. The taxable event on which the tribal tax is imposed is the severing, saving and removal of oil and gas from reservation soil.

Paragraph 4 of the Ordinance exempts only "royalty gas, oil or condensate taken by the Tribe in kind, and used

by the Tribe." Paragraph 1 states that "taxes shall become due at the time of severance"; paragraph 5 requires the "operator of each well" to pay the tax; and paragraph 6 requires each operator to report the production from each well.

The Amoco Petitioners argue that the language "severed, saved and removed from tribal lands" means that the tax only applies to oil and natural gas which is removed to points outside the reservation boundaries, while in fact the clear intent is to apply the tax to the removal of oil and natural gas from the earth *within* the exterior boundaries of the reservation. Petitioners cite the language "produced on the Jicarilla Apache reservation and sold or transported off the reservation" as evidence of the tax's discriminatory nature. Amoco Petition at 21. These words were designed to ensure that all oil and gas not used by lessees in aid of production, or used by the tribal government for tribal purposes, would be subject to the tax. All oil and all gas, except pipeline production, is sold at the wellhead. Pipeline producers transport their production off the reservation without sale, hence the necessity for the wording "transported off the reservation". The language of the tax ordinance ensures the equal taxation of all oil and gas produced on the reservation, including pipeline production, exempting only that used by lessees in aid of production or used by the Tribe for tribal governmental purposes. This Court has specifically upheld this type of classification and exemption in *Utah Power and Light Co. v. Pfost*, 286 U.S. 165 (1932).

The Courts have unanimously held that production or mining of natural resources is a distinctly local event, occurring before the products move into interstate commerce. Taxes which are applied evenhandedly to sever-

ance of minerals do not impose an unconstitutional burden upon commerce nor do several such taxes constitute multiple taxation on commerce because commerce has not begun. *Oliver Mining Co. v. Lord*, 262 U.S. 172 (1923); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927).

Utah Power and Light Co., supra, implies that exemption for the benefit of tribal members would not be fatal to the tax. *See also, The Indian Preference Acts*, 25 U.S.C. §§44, 46, 47, 274, 472; *Morton v. Mancari*, 417 U.S. 535 (1974).

In *Hope Natural Gas Co. v. Hall, supra*, this Court dismissed the objection that the West Virginia statute taxing gas production would subject gross receipts derived from interstate commerce to the tax, stating:

> The plain result of the opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise. If, thereafter, executive officers disregard the approved construction and fixed values upon any improper basis appropriate relief may be obtained through the courts. *Id.* at 288.

Like the tax in the *Hope Natural Gas Co.* case, the volume of production on which the tribal tax is measured and determined is at the wellhead in every case, as provided in paragraph 6 of the Ordinance. Measurement must necessarily be taken at the wellhead because the gas is commingled with gas from other wells when taken into gathering lines. Crude oil is stored at holding tanks at the side of each well and taken off from the well site in a tanker truck or pumped into a pipeline, where it may be commingled with oil from other wells. Measurement of oil production therefore must thus also be taken at the wellhead.

There is no evidence whatsoever that any local business gains a direct commercial advantage over a business off the reservation or outside the State of New Mexico because of the tax. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959).

B. The Tribal Tax Does Not Impose A Multiple Burden On Interstate Commerce, Prohibited By The Constitution.

This argument addresses Point IV B, page 23 of the Amoco Petition and Point 4, page 26 of the Merrion and Bayless Petition.

Petitioners claim, contrary to the holding of the Court of Appeals, that the tribal severance tax constitutes a unlawful multiple burden on interstate commerce based on the fact that both the Tribe and the State of New Mexico levy taxes on the production of oil and gas on the Jicarilla Apache reservation. New Mexico imposes six separate taxes on oil and gas production or equipment: the Oil and Gas Severance Tax, N.M. Stat. Ann. 1978, §§7-29-1 to -22; the Oil and Gas Conservation Tax, §§7-30-1 to -26; the Oil and Gas Emergency School Tax, §§7-31-1 to -25; the Oil and Gas Ad Valorem Production Tax, §§7-32-1 to -27; Natural Gas Processors Tax, §§7-33-1 to -22; and Oil and Gas Production Equipment Ad Valorem Tax, §§7-34-1 to -20. Petitioners claim in effect that an Indian tribe will be precluded from levying any tax on an item later transported off the reservation simply because the State in which the reservation happens to be located has exacted one or more taxes on the same item.

Thus, Indian tribes would be denied the right, possessed by other governments, to tax local transactions on

the reservation if the state in which they are located exacts a similar tax. Such interference with tribal self-government has been expressly prohibited by this Court in *Williams v. Lee*, 358 U.S. 217 (1959). This Court in *McClanahan v. Arizona Tax Commission, supra* at 179, considered this potential conflict in circumstances involving non-Indians and stated as follows:

> In these situations, both the tribe and the State can fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

Petitioners argue that the additional burden of the one tribal severance tax in itself imposes an unconstitutional multiple burden on commerce although the six separate taxes imposed by the State are legally harmless. Amoco Petition, Point IV B; M&B Petition, Point 4.

The evidence at the trial was undisputed that the State of New Mexico provides only minimal services on the reservation. The Tribe tendered proof, denied admission by the Court, as to the substantial services provided by the Tribe out of tribal funds. Respondent's Appendix A. Whether the State's services provided on the reservation justify any state tax, and whether such taxes interfere with Indian self-government, are not at issue in this case. Nevertheless, there is no constitutional prohibition against local taxation by two governments with overlapping jurisdiction. The decision in *Fort Mojave Tribe v. San Bernardino County, supra*, presents a situation in which the *Williams* test was applied to possessory interest taxes levied by both the State and the Tribe on non-Indian lessees of tribal trust lands. The existence of the two

taxes was not a problem for the Court of Appeals which stated,

> There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. *Id.* at 1258.

It was not the purpose of the Commerce Clause of the Constitution to relieve those engaged in interstate commerce from their just share of local tax burdens even though it increases the cost of doing business, *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938). Prohibited taxes are those which may be disproportionately imposed after products begin to move in commerce by every state through which the products move. *General Motors Corporation v. Washington*, 377 U.S. 436, 440 (1964).

There is no constitutional ban upon the imposition of non-discriminatory local taxes by two taxing authorities having jurisdiction. *Fort Mojave Tribe v. San Bernardino County, supra.* Double taxation is a fact of modern life. *Colville, supra,* at 21-22.

V

THE JICARILLA APACHE TRIBE HAD AN ORGANIZED AND EXISTING SOVEREIGN GOVERNMENT AT THE TIME OF THE UNITED STATES OCCUPATION OF NEW MEXICO

The Merrion and Bayless Petitioners state on page 11:

> Tracing the source of tribal authority to tax to the power to exclude is particularly appropriate in the case of a tribe such as the Jicarilla Apaches. Unlike many Indian tribes, the Jicarillas were not an organized and existing sovereign government at the time the Constitution was signed. As Chief

> Judge Seth pointed out in his dissent below, the Jicarillas totally lacked any central authority and merely banded together for purposes of military defense or aggression.

It is respectfully submitted by Respondents that this Court should not review the history of any particular Indian tribe to determine the source and extent of its sovereignty at the time of American occupation of tribal territory. Nevertheless, since the issue has been raised by Petitioners, a response which will establish that the argument is totally without historical foundation seems appropriate.

The Indian Claims Commission in *Jicarilla Apache Tribe v. United States*, in Findings of Fact and Opinion issued August 26, 1963, found and held that the Tribe occupied and held aboriginal Indian title from time immemorial to an area comprising the major portion of northeastern New Mexico. 12 Ind Cl. Comm. 439, 467-68, 484-86. While it is true that in ancient times the ancestors of the Jicarilla Apache Tribe hunted in bands because of the large area needed to provide subsistence, nevertheless, these bands were amalgamated and identified as the Jicarilla Apache Tribe long prior to American occupation.[12]

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[12] Findings of the Indian Claims Commission established that the ancestors of the Jicarilla Apache Tribe settled in locations in northeastern New Mexico and southeastern Colorado after their migration from the north in the 11th century. *Id.* at 443-44. According to their creation legend they were made up of two basic groups representing the merger of two peoples; the Olleros were mountain people, and the Ilaneros were plains people. The language, culture and economy were the same; they were familiar with each other's terrain and commonly hunted and engaged in food gathering together, and shared ceremonial relay races held each year. *Id.* Findings 8 and 9 at 444-45.

Contrary to the statement of Judge Seth that the Jicarilla Apaches were composed with small groups with no geographical

Obviously, hunting and gathering tribes of Indians occupying extensive areas in the arid southwest did not have the same tribal cohesiveness as did the Pueblos, but did have attributes of sovereignty to which the organized tribes succeeded. The sovereignty of the Apache Tribes in New Mexico was recognized by officials of the United States who commenced negotiation of treaties with tribal chiefs the year after the ratification of the Treaty of Guadalupe Hidalgo. These actions were inconsistent with Judge Seth's theory that "there were no vestiges preserved of any governmental powers whatever in the Indian groups in New Mexico who did not occupy Pueblos". Amoco Appendix at 33a.

General Choice and Colonel Charles May of the U.S. Army attempted to negotiate a treaty with the various tribes of Apaches in December 1849. 12 Ind. Cl. Comm. at 459. Governor Calhoun and Colonel Monroe executed a peace treaty with Chacon, Lobo, Guero, and Josecito, who were respectively *principal chief* and subordinate captains

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Footnote continued
significance or relationship to any other group (M&B Appendix A at 32), the Indian Claims Commission found that some Apache bands north of the Pecos had lost their separate identities and became merged with the Jicarilla Apaches about the middle of the 18th century. *Id.* Finding 28 at 453. The Commission also stated:

> 30. *The bands of Apache Indians which formed the Jicarilla Apache Tribe during the Spanish period of occupancy* maintained homes in mountain areas along the east of the Rio Grande River in northeast present New Mexico where they practiced agriculture; and hunted to the south, north and to the east thereof on the edge of the buffalo plains, sometimes venturing northward to the Arkansas River and westward of the Rio Grande River. Finding 30 at 454. (emphasis added)

In 1786 Governor Anza stabilized the New Mexico frontier by a treaty of peace with the Comanches, thus recognizing the sovereignty of that warlike hunting tribe. *Id.* Finding 28 at 453. The population of the Jicarilla Apache Tribe in 1848 was approximately 1750 Indians. *Id.* Finding 20 at 449.

of "the Apache Indians East of Rio Del Norte" (Jicarillas). This treaty was not confirmed. In 1852, a treaty was executed by Indian Agent John Greiner and Colonel Sumner with certain principal chiefs of "the Apache Nation", probably Mescalero chiefs, and ratified by the U.S. Senate. *Id.* at 461. Another treaty was negotiated with the Jicarilla Apaches by Governor Lane in 1853 which was not approved by the Commissioner of Indian Affairs. *Id.* at 462. In 1855 Governor Meriwether negotiated a treaty of peace with the "Jicarilla Band of the Apache Nation" providing for a Jicarilla reservation and extinguishment of Indian title to all Jicarilla lands within New Mexico. This treaty was not ratified because of white settler's claims to the reserved lands proposed. *Id.* at 463-465.

F. Cohen, *Federal Indian Law*, *supra* at 33-34, placed the relationship of treaty making to sovereignty in perspective as follows:

> That treaties with Indian tribes are of the same dignity as treaties with foreign nations, is a view which has been repeatedly confirmed by the federal courts and never successfully challenged.

In *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 748-49 (1835), the Court said:

> [*A*]*ccording to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign.* The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws. It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting-grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize. (emphasis supplied)

Recognition of aboriginal title, it is submitted, implies recognition of tribal sovereignty limited by the rights of discovery and conquest by the European powers. The European powers, including Spain, recognized aboriginal title in the hunting tribes, as well as in the Pueblos and other sedentary tribes, and made treaties with the hunting tribes. *See* note 12 *supra.*

The United States is the paramount sovereign as to lands acquired from Mexico, as it is paramount as to lands acquired from England or France. The Treaty of Guadalupe Hidalgo is silent as to treatment of Indian customs or laws and is irrelevant to the questions at issue. There was no alteration of these customs or laws, thus they remained in force, as stated in *Mitchel.* The argument of Petitioners, that the Apache tribes in New Mexico retained no vestiges of government powers, if valid, would apply to the Pueblo Indians as well. The difficulties of integrating tribal sovereignty into the dual federal-state system created by the Constitution, mentioned in page 12 of the Merrion and Bayless Petition, is again irrelevant to the issues of this case.

VI

THE QUESTION OF CONSTITUTIONAL PROTECTION AGAINST ABUSES OF TRIBAL AUTHORITY IS NOT AT ISSUE IN THIS CASE

The Merrion and Bayless Petitioners state that there is an important question of federal law which has not been but should be settled by this Court with respect to the extent of constitutional guarantees which should be extended to non-Indians as a protection against "the excesses of any sovereignty found to exist in Indian tribes". These Petitioners assume that the enforcement of tribal

taxation may result in the banishment of non-Indians from the reservation, cancellation of their leases and seizure of their property, and that criminal jurisdiction may be required. M&B Petition, at 24 n. 16. This "parade of the horribles" could apply equally to arbitrary action of tribal authorities or individual Indians if they shut down Petitioners' oil or gas wells, shut off their roads, or denied access to their production facilities without presumed authority of tribal legislation. Enforcement of tribal taxation can be obtained by civil action, authority for which was again recognized in *Colville*, *supra*, slip op. at 15.

If at any future time, tribal authorities act beyond their authority and jurisdiction to jeopardize the property rights of non-Indians, only then would it be appropriate for the Court to determine the nature and extent of constitutional guarantees to be extended as protection against "the excesses of any sovereignty found to exist in Indian tribes", whatever that may mean. M&B Petition, at 22; *See Hope Natural Gas Co. v. Hall*, *supra*.

The argument that persons should not be subjected to occupation or license taxes without the right to participate in the government imposing such taxes is one that has long since been settled adversely to Petitioners. The Circuit Court of Appeals of the Eight Circuit in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 557 (1958), *cert. denied*, 358 U.S. 932 (1959), in discussing a license tax levied by the Oglala Sioux for grazing and farming on their tribal lands by non-members of the Tribe, stated as follows:

> It is finally argued that the tax is violative of defendants' rights in that it constitutes taxation without representation. If it be conceded that the act of the tribe in levying this tax constitutes taxation without representation that alone is certainly not fatal. The taxability of property is not de-

pendent upon the residence of the owner of the property. The property rights of an alien or non-resident are taxable the same as the property of residents who may be said to have representation. As said in *Thomas v. Gay*, 169 U.S. 264, 277 (1898) cited by defendants:

> Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. (Citing cases) So, likewise it is settled law that the property, both real and personal, of non-residents may be lawfully subjected to the tax laws of the state in which they are situated.

Many taxes might be similarly characterized and it cannot be said that the license tax was the exercise of arbitrary power. It was levied uniformly on all lessees of these tribal trust lands.

See also Hagar v. Reclamation District, 111 US 701, 709 (1884).

(Continued with Conclusion)

CONCLUSION

Respondents respectfully submit that there are no substantial questions of law raised by Petitioners that have not already been decided by this Court adversely to Petitioners, nor are there conflicts in the decisions of the Circuit Courts of Appeals as to the issues raised herein. Approval by this Court of the tribal power to impose severance taxes on non-Indians will subject Petitioners' exploitation of mineral resources on tribal lands to reasonable regulation and taxation by the Jicarilla Apache Tribe, scarcely a "far reaching consequence" detrimental to the national interests. The Petitions for Certiorari should therefore be denied.

Dated: 25 August, 1980.

Respectfully submitted,

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